the property in Kentucky; even if any proceeding for revoking the will as to that property could have been maintained there. If the appellees had obtained a revocation of the probate, or of the will, by the judgment of any Court in Indiana, that judgment, for the reason already suggested, could not have concluded the right of the parties here at Moore's death. Consequently, the validity and effect of the will would, as to that, have been fit subjects of controversy in a Court of this State. The sentence of revocation by the Indiana Court, would have been no more conclusive than the probate itself was. It seems to us, therefore, that the law of Kentucky must furnish to the appellees a remedy, if they be entitled anywhere to relief; even if no statute of this State had expressly secured and prescribed a remedy."

These citations might be extended farther. If they indicate the law and its policy, may we not ask, upon what grounds the late venerable Chief Justice of Massachusetts affirms the existence of "a general course of policy, to consider one effectual probate of a will, whether in our own or in a foreign State, according to the laws of such State, as conclusive and effectual, to all purposes?" *Crippen* vs. *Dexter*, 13 Gray, 330.

RECENT AMERICAN DECISIONS.

In the Superior Court of New York—General Term.

GUSTAV LINDENMULLER, PLAINTIFF IN ERROR, *vs.* THE PEOPLE, DEFENDANTS IN ERROR.

1. The Christian religion, as the acknowledged religion of the people by consen and usage of the community, is entitled to respect and protection from the law, although it be not the legal religion of the State established by law.
2. Christianity is a part of the common law of England, and the common law of England, subject to Legislative or Constitutional alteration, is, and ever has been, a part of the law of this country.

3. As a civil and political institution, the establishment and regulation of the Sabbath is within the just powers of the civil government.

4. Hence, when the Legislature enacted a statute whereby Sunday theatres and theatrical entertainments on the Sabbath are declared nuisances, and an indictment was duly found and prosecuted against the lessee of such a theatre, it was held to be within the constitutional power of the Legislature to enact such a statute, and that it did not interfere with religious belief, worship, faith, or practice.

F. S. Stallknecht, Attorney for plaintiff in error.
N. J. Waterbury, District Attorney, for the people.
H. L. Clinton and *J. T. Brady*, for plaintiff in error.
J. H. Anthon, for defendants in error.

The opinion of the Court was delivered by

ALLEN, J.—The constitutionality of the law, under which Lindenmuller was indicted and convicted, does not depend upon the question whether or not Christianity is a part of the common law of this State. Were that the only question involved, it would not be difficult to show that it was so in a qualified sense—not to the extent that would authorize a compulsory conformity in faith and practice to the creed and formula of worship of any sect or denomination, or even in those matters of doctrine and worship common to all denominations styling themselves Christian, but to the extent that entitles the Christian religion and its ordinances to respect and protection, as the acknowledged religion of the people. Individual consciences may not be enforced; but men of every opinion and creed may be restrained from acts which interfere with Christian worship, and which tend to revile religion and bring it into contempt.. The belief of no man can be constrained, and the proper expression of religious belief is guarantied to all; but this right, like every other right, must be exercised with strict regard to the equal rights of others; and, when religious belief or unbelief leads to acts which interfere with the religious worship and rights of conscience of those who represent the religion of the country, as established, not by law, but by the consent and usage of the community, and existing before the organization of the government, their acts may be restrained by legislation, even if they are not indictable at

common law. Christianity is not the legal religion of the State, as established by law. If it were, it would be a civil or political institution, which it is not; but this is not inconsistent with the idea that it is in fact, and ever has been, the religion of the people. This fact is everywhere prominent in all our civil and political history, and has been, from the first, recognized and acted upon by the people, as well as by constitutional conventions, by legislatures, and by courts of justice.

It is not disputed that Christianity is a part of the common law of England; and in *Rex* vs. *Woolston*, Str. 834, the Court of King's Bench would not suffer it to be debated, whether to write against Christianity in general was not an offence punishable in the temporal courts at common law. The common law, as it was in force on the 20th day of April, 1777, subject to such alterations as have been made from time to time by the Legislature, except such parts of it as are repugnant to the Constitution, is, and ever has been, a part of the law of the State. Const. of 1846, Art. 1, § 17; Const. of 1821, Art. 7, § 13; Const. of 1777, § 25. The claim is, that the constitutional guarantees for the free exercise and enjoyment of religious profession and worship are inconsistant with and repugnant to the recognition of Christianity as the religion of the people, entitled to and within the protection of the law. It would be strange that a people, Christian in doctrine and worship, many of whom, or whose forefathers had sought these shores for the privilege of worshipping God in simplicity and purity of faith, and who regarded religion as the basis of their civil liberty and the foundation of their rights, should, in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law the religion which was dear to them as life, and dethrone the God who, they openly and avowedly professed to believe, had been their protector and guide as a people. Unless they were hypocrites, which will hardly be charged, they would not have dared, even if their consciences had suffered them, to do so. Religious tolerance is entirely consistent with a recognized religion. Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality,

with freedom of conscience and religious preference, is secured to individuals of every other creed and profession. To a very moderate and qualified extent, religious toleration was secured to the people of the colony by the charter of liberties and privileges granted by his Royal Highness to the inhabitants of New York and its dependencies in 1683, 2 R. L., Appendix No 2; but was more amply provided for in the Constitution of 1777. It was then placed substantially upon the same footing on which it now stands. The Constitution of 1777, § 38, ordained that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should forever thereafter be allowed, provided that the liberty of conscience thereby guarantied should not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. The same provision was incorporated in the Constitution of 1821, Art. 7, § 3, and in that of 1846, Art. 1, § 3. The convention that framed the Constitution of 1777 ratified and approved the Declaration of Independence, and prefixed it to the Constitution as a part of the preamble, and in that instrument a direct and solemn appeal is made "to the Supreme Judge of the world," and a "firm reliance on the protection of Divine Providence" for the support of the declaration is deliberately professed. The people, in adopting the Constitution of 1821, expressly acknowledged with "gratitude the grace and beneficence of God," in permitting them to make choice of their form of government; and, in ratifying the Constitution of 1846, declare themselves "grateful to Almighty God" for their freedom. The first two Constitutions of the State, reciting that "ministers of the Gospel are, by their profession, dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their function," declare that no "minister of the Gospel, or priest of any denomination whatsoever, should be eligible to or hold any civil or military office within the State;" and each of the Constitutions has required an oath of office from all, except some of the inferior officers, taking office under it.

These provisions and recitals very clearly recognize some of the fundamental provisions of the Christian religion, and are certainly

very far from ignoring God as the Supreme Ruler and Judge of the Universe, and the Christian religion as the religion of the people, embodying the common faith of the community, with its ministers and ordinances, existing without the aid of, or political connection with, the State, but as intimately connected with a good government, and the only sure basis of sound morals.

The several Constitutional Conventions also recognized the Christian religion as the religion of the State, by opening their daily sessions with prayer, by themselves observing the Christian Sabbath, and by excepting that day from the time allowed to the Governor for returning bills to the Legislature.

Different denominations of Christians are recognized, but this does not detract from the force of the recognition of God as the only proper object of religious worship, and the Christian religion as the religion of the people, which they did not intend to destroy, but to maintain. The intent was to prevent the unnatural connection between church and State, which had proved as corrupting and detrimental to the cause of pure religion as it had been oppressive to the conscience of the individual. The founders of the Government and the framers of our Constitution believed that Christianity would thrive better, that purity in the church would be promoted, and the interests of religion advanced, by leaving the individual conscience free and untrammelled, precisely in accordance with the "benevolent principles of rational liberty," which guarded against "spiritual oppression and intolerance;" and "wisdom is justified of her children" in the experiment, which could hardly be said if blasphemy, Sabbath-breaking, incest, polygamy, and the like, were protected by the Constitution. They did, therefore, prohibit the establishment of a State religion, with its enabling and disabling statutes, its test oaths and ecclesiastical courts, and all the pains and penalties of nonconformity, which are only snares to the conscience, and every man is left free to worship God according to the dictates of his own conscience, or not to worship Him at all, as he pleases. But they did not suppose they had abolished the Sabbath as a day of rest for all, and of Christian worship for those who were disposed to engage in it, or deprived themselves of the power

to protect their God from blasphemy and revilings, or their religious worship from unseemly interruptions. Compulsory worship of God in any form is prohibited, and every man's opinion on matters of religion, as in other matters, is beyond the reach of law. No man can be compelled to perform any act or omit any act as a duty to God; but this liberty of conscience in matters of faith and practice is entirely consistent with the existence, in fact, of the Christian religion, entitled to and enjoying the protection of the law as the religion of the people of the State, and as furnishing the best sanctions of moral and social obligations. The public peace and public welfare are greatly dependent upon the protection of the religion of the people of the country, and the preventing or punishing of offences against it, and acts wantonly committed subversive of it. The claim of the defence, carried to its necessary sequence, is, that the Bible and religion, with all its ordinances, including the Sabbath, are as effectually abolished as they were in France during the revolution, and so effectually abolished, that duties may not be enforced as duties to the State because they have been heretofore associated with acts of religious worship, or connected with religious duties. A provision similar to ours is found in the Constitution of Pennsylvania; and in *Vidal* vs. *Girard's Executors*, 2 How. 127, the question was discussed, whether the Christian religion was a part of the common law of that State; and Justice Story, in giving judgment, at page 198, after referring to the qualifications in the Constitution, says: "So that we are compelled to admit, that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." The same principle was decided by the State Court, in *Updegraff* vs. *Commonwealth*, 11 S. & R. 394. The same is held in Arkansas, *Show* vs. *State*, 5 Eng. 259. In our own State, in *People* vs. *Ruggles*, 8 J. R. 291, the court held that blasphemy against God, and contumelious reproach and profane ridicule of Christ or the Holy Scriptures, were offences punishable at the common law in this State as public offences. Ch. J. Kent says, that

to revile the religion professed by almost the whole community is an abuse of the right of religious opinion and free discussion secured by the Constitution, and that the Constitution does not secure the same regard to the religion of Mahomet or of the Grand Llama as to that of our Saviour, for the plain reason that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity. He says further, that the Constitution "will be fully satisfied by a free and universal toleration, without any of the tests, disabilities, or discriminations incident to a religious establishment. To construe it as breaking down the common law barriers against licentious, wanton and impious attacks upon Christianity itself, would be an enormous perversion of its meaning."

This decision gives a practical construction to the "toleration" clause in the State Constitution, and limits its effect to a prohibition of a church establishment by the State, and of all "discrimination or preference" among the several sects and denominations in the "free exercise and enjoyment of religious profession and worship." It does not, as interpreted by this decision, prohibit the courts or the Legislature from regarding the Christian religion as the religion of the people, as distinguished from the false religions of the world. This judicial interpretation has received the sanction of the Constitutional Convention of 1827, and of the people of the State in the ratification of that Constitution, and again in adopting the Constitution of 1846.

In was conceded in the Convention of 1821 that the decision in *People* vs. *Ruggles* did decide that the Christian religion was the law of the land, in the sense that it was preferred over all other religions, and entitled to the recognition and protection of the temporal courts by the common law of the State; and the decision was commented on with severity by those who regarded it as in violation of the freedom of conscience and equality among religionists secured by the Constitution. Mr. Root proposed an amendment to correct the alleged error of the Supreme Court in that decision, made, as he considered, in defiance of the Constitution, to the effect that the judiciary should not declare any particular religion to be the law of the land. The decision was vindicated as a

just exponent of the Constitution and the relation of the Christian religion to the State; and the amendment was opposed by Chancellor Kent, Daniel D. Tompkins, Col. Young, Mr. Van Buren, Rufus King, and Chief Justice Spencer, and rejected by a large majority, and the former provision retained, with the judicial construction fully recognized. (New York State Convention of 1821, 462, 574.) It is true that the gentlemen differed in their views as to the effect and extent of the decision, and as to the legal status of the Christian religion in the State. One class, including Chief Justice Spencer and Mr. King, regarded Christianity—the Christian religion as distinguished from Mahomedanism, &c.—as a part of the common law adopted by the Constitution; while another class, in which were included Chancellor Kent and Mr. Van Buren, were of the opinion that the decision was right, not because Christianity was established by law, but because Christianity was in fact the religion of the country, the rule of our faith and practice, and the basis of public morals. According to their views, as the recognized religion of the country, "the duties and injunctions of the Christian religion" were considered as interwoven with the law of the land, and as part and parcel of the common law, and that "maliciously to revile it is a public grievance, and as much so as any other public outrage upon common decency and decorum." (Pr. Ch. Kent in debate, page 576.) This difference in views is in no sense material, as it leads to no difference in practical results and conclusions. All agreed that the Christian religion was engrafted upon the law, and entitled to protection as the basis of our morals and the strength of our government, but for reasons differing in terms and in words, rather than in substance. Within the principle of the decision of *The People* vs. *Ruggles*, as thus interpreted and approved, and made a part of the fundamental law of the land by the rejection of the proposed amendment, every act done maliciously, tending to bring religion into contempt, may be punished at common law, and the Christian Sabbath, as one of the institutions of that religion, may be protected from desecration by such laws as the Legislature, in their wisdom, may deem necessary to secure to the community the privilege of undisturbed worship,

and to the day itself that outward respect and observance which may be deemed essential to the peace and good order of society, and to preserve religion and its ordinances from open reviling and contempt—and this not as a duty to God, but as a duty to society and to the State. Upon this ground the law in question could be sustained, for the Legislature are the sole judges of the acts proper to be prohibited, with a view to the public peace, and as obstructing religious worship, and bringing into contempt the religious institutions of the people.

But as a civic and political institution, the establishment and regulation of a Sabbath is within the just powers of the civil government. With us, the Sabbath, as a civil institution, is older than our government. The framers of the first Constitution found it in existence; they recognized it in their acts, and they did not abolish it, or alter it, or lessen its sanctions or the obligations of the people to observe it. But if this had not been so the civil government might have established it. It is a law of our nature that one day in seven should be observed as a time of relaxation and refreshment, if not for public worship. Experience has shown that the observance of one day in seven as a day of rest "is of admirable service to a State, considered merely as a civil institution:" 4 Bl. Com. 63. We are so constituted, physically, that the precise portion of time indicated by the decalogue must be observed as a day of rest and relaxation, and nature, in the punishment inflicted for a violation of our physical laws, adds her sanction to the postive law promulgated at Sinai. The stability of government, the welfare of the subjects and the interest of society have made it necessary that the day of rest observed by the people of a nation should be uniform, and that its observance should be to some extent compulsory, not by way of enforcing the conscience of those upon whom the law operates, but by way of protection to those who desire and are entitled to the day. The necessity and value of the Sabbath is acknowledged by those not professing Christianity. In December, 1841, in the French Chamber of Deputies, an Israelite expressed his respect for the institution of the Lord's day, and opposed a change of law which would deprive a

class of children of the benefit of it; and in 1844, the Consistory-General of the Israelites, at Paris, decided to transfer the Sabbath of the Jews to Sunday. A similar disposition was manifested in Germany: Bayler's Hist. of Sab. 187. As a civil institution, the selection of the day is at the option of the Legislature; but for a Christian people, it is highly fit and proper that the day observed should be that which is regarded as the Christian Sabbath, and it does not detract from the moral or legal sanction of the law of the State that it conforms to the law of God, as that law is recognized by the great majority of the people. In this State the Sabbath exists as the day of rest by the common law, and without the necessity of legislative action to establish it; and all that the Legislature attempt to do in the "Sabbath Laws" is to regulate its observance. The body of the Constitution recognized Sunday as a day of rest, and an institution to be respected by not counting it as a part of the time allowed to the Governor for examining bills submitted for his approval. A contract, the day of the performance of which falls on Sunday, must, in the case of instruments on which days of grace are allowed, be performed on the Saturday preceding, and in all other cases on Monday: *Salter* vs. *Burt*, 20 U. R. 205; *Avery* vs. *Stewart*, 2 Cowen, 60. Compulsory performance on the Sabbath cannot be required, but the law prescribes a substituted day. Redemption of land, the last day for which falls on Sunday, must be made the day before: *People* vs. *Luther*, 1 W. R. 42. No judicial act can be performed on the Sabbath, except as allowed by statute, while ministerial acts not prohibited are not illegal: *Sayles* vs. *Smith*, 12 W. R. 57; *Butler* vs. *Kelsey*, 15 J. R. 177; *Field* vs. *Park*, 20 id. 140. Work done on a Sunday cannot be recovered for, there being no pretence that the parties keep the last day of the week, the work not being a work of necessity and charity: *Watts* vs. *Van Ness*, 1 Hill, 76; *Palmer* vs. *City of New York*, 2 Sand. 318; *Smith* vs. *Wilcox*, 19 Barb. 481; S. C. 25 id. 341. The Christian Sabbath is then one of the civil institutions of the State, and to which the business and duties of life are, by the common law, made to conform and adapt themselves. The same cannot be said of the Jewish Sab-

bath, or the day observed by the followers of any other religion. The respect paid to such days, other than that voluntarily paid by those observing them as days of worship, is in obedience to positive law. There is no ground of complaint in the respect paid to the religious feeling of those who conscientiously observe the seventh rather than the first day of the week, as a day of rest, by the legislation upon that subject, and exempting them from certain public duties and from the service of process on their Sabbath, and exempting them from the operation of certain other statutes regulating the observance of the first day of the week: 1 R. S. 675, § 70 Laws of 1847, ch. 349. It is not an infringement of the right of conscience or an interference with the free religious worship of others, that Sabbatarians are exempted from the service of civil process and protected in the exercise of their religion on their Sabbath. Still less is it a violation of the rights of conscience of any that the Sabbath of the people, the day set apart by common consent and usage from the first settlement of the land as a day of rest, and recognized by the common law of the State as such, and expressly recognized in the Constitution as an existing institution, should be respected by the law-making power, and provision made to prevent its desecration by interrupting the worship, or interfering with the rights of conscience, in any way, of the public as a Christian people. The existence of the Sabbath day as a civil institution being conceded, as it must be, the right of the Legislature to control and regulate it and its observance is a necessary sequence. If precedents were necessary to establish the right to legislate upon the subject, they could be cited from the statutes and ordinances of every government, really or nominally Christian, and from the earliest periods. In England as early as the reign of Athelstan, all merchandising on the Lord's day was forbid under severe penalties; and from that time very many statutes have been passed in different reigns, regulating the keeping of the Sabbath, prohibiting fairs and markets, the sale of goods, assemblies or concourse of the people for any sports and pastimes whatsoever, worldly labor, the opening of a house or room for public entertainment or amusement, the sale of beer, wine,

spirits, &c., and other like acts on that day. There are other acts which are designed to compel attendance at church and religious worship, which would be prohibited by the Constitution of this State as infringements upon the right to the free exercise and enjoyment of religious profession and worship. But the acts referred to do not relate to religious profession or worship, but to the civil obligations and duties of the subject. They have respect to his duties to the State, and not to God, and as such are within the proper limits of legislative power. There have been times in the history of the English government when the day was greatly profaned, and practices tolerated at court and throughout the realm, on the Sabbath and other days, which would meet at this time with little public favor either there or here. But these exceptional instances do not detract from the force of the long series of acts of the British Parliament, representing in legislature the sentiment of the British nation, as precedents and as a testimony in favor of the necessity and propriety of a legislative regulation of the Sabbath. Our attention is called to the fact that James I. wrote a "Book of Sports," in which he declared that certain games and pastimes were lawful upon Sunday. The book was published in 1618, and by it he permitted the "lawful recreations" named "after the end of Divine service" on Sundays, "so as the same be had in due and convenient time, without impediment or neglect of Divine service." The permission is thus qualified: "But withall we doe here account still as prohibited all unlawfull games to be used on Sundayes only, as beare and bull baitings, *interludes*, and at all times in the meaner sort of people prohibited, bowling." Bayler's Hist. Sabbath, 157. Lindenmuller's theatre would have been prohibited even by King James' Book of Sports.

In most, if not all the States of the Union, laws have been passed against Sabbath breaking, and prohibiting the prosecution of secular pursuits upon that day; and in none of the States, to my knowledge, except in California, have such laws been held by the Courts to be repugnant to the free exercise of religious profession and worship, or a violation of the rights of conscience, or an excess or abuse of the legislative power, while in most States the

legislature has been upheld by the Courts and sustained by well-reasoned and able opinions: *Updegraph* vs. *Commonwealth*, 11 S. & R. 394; *Arkansas*, *Show* vs. *State*, 5 Eng. 259; *Bloom* vs. *Richards*, 2 Ohio, 387; *Warne* vs. *Smith*, 8 Conn. 14; *Johnston* vs. *Com.*, 10 Harris 102; *State* vs. *Arabs*, 20 Miss. 214: *Story* vs. *Elliott*, 8 Cow. 27.

As the Sabbath was older than our State government, was a part of the laws of the colony, and its observance regulated by colonial laws, State legislation upon the subject of its observance was almost coeval with the formation of the State government. If there were any doubt about the meaning of the Constitution securing freedom in religion, the contemporaneous and continued acts of the legislature under it would be very good evidence of the intent and understanding of its framers, and of the people who adopted it as their fundamental law. As early as 1788, travelling, work, labor, and exposing of goods to sale on that day were prohibited: 2 Greenl. 89. In 1789 the sale of spirituous liquors was prohibiled: Andrews, 467; and from that time statutes have been in force to prevent Sabbath desecration, and prohibiting acts on that day which would be lawful on other days of the week. Early in the history of the State government, the objections taken to the act under consideration were taken before the Council of Revision, to an act to amend the act entitled "an act for suppressing immorality," which undertook to regulate Sabbath observance, because the provisions, as was claimed, militated against the Constitution by giving a preference to one class of Christians and oppressing others, because it in some manner prescribed the mode of keeping the Sabbath, and because it was inexpedient to impose obligations on the consciences of men in matters of opinion. The Council, consisting of Governor Jay, Chief Justice Lansing, and Judges Lewis and Benson, overruled the objections and held them not well taken: Street's N. Y. Council of Revision, 422. I have not access to the California case referred to, *Ex parte* Newman, 9 Cal. 502, but with all respect for the court pronouncing the decision, as authority in this State, the opinion of the Council of Revision thus constituted and deliberately pronounced, should outweigh it.

If the court in California rest their decision upon a want of power in the legislature to compel religious observances, I should not dissent from the position, and the only question would be whether the act did thus trench on the inviolable rights of the citizen. If it merely restrained the people from secular pursuits and from practices which the legislature deemed hurtful to the morals and good order of society, it would not go beyond the proper limits of legislation. The act complained of here compels no religious observance, and offences against it are punishable not as sins against God, but as injurious to and having a malignant influence on society. It rests upon the same foundation as a multitude of other laws upon our statute book, such as those against gambling, lotteries, keeping disorderly houses, polygamy, horse-racing, profane cursing and swearing, disturbance of religious meetings, selling of intoxicating liquor on election days within a given distance of the polls, &c. All these and many others do, to some extent, restrain the citizen and deprive him of some of his national rights; but the legislature have the right to prohibit acts injurious to the public and subversive of the government, which tend to the destruction of the morals of the people and disturb the peace and good order of society. It is exclusively for the legislature to determine what acts should be prohibited as dangerous to the community. The laws of every civilized State embrace a long list of offences which are such merely as *mala prohibita*, as distinguished from those which are *mala in se*. If the argument in behalf of the plaintiff in error is sound, I see no way of saving the class of *mala prohibita*. Give every one his natural rights, or what are claimed as natural rights, and the list of civil offences will be confined to those acts which are *mala in se*, and a man may go naked through the streets, establish houses of prostitution *ad libitum*, and keep a faro-table on every corner. This would be repugnant to every idea of a civilized government. It is the right of the citizen to be protected from offences against decency, and against acts which tend to corrupt the morals and debase the moral sense of the community. Regarding the Sabbath as a civil institution, well established, it is the right of the citizen that it should be kept and

observed in a way not inconsistent with its purpose and the necessity out of which it grew, as a day of rest rather than as a day of riot and disorder, which would be effectually to overthrow it, and render it a curse rather than a blessing. WOODWARD, J., in *Johnston* vs. *Com.*, 10 Harris 102, says:—"The right to rear a family with a becoming regard to the institutions of Christianity, and without compelling them to witness the hourly infractions of one of its fundamental laws; the right to enjoy the peace and good order of society and the increased securities of life and property which result from a decent observance of the Sabbath; the right of the poor to rest from labor without diminution of wages;" the right of beasts to the rest which nature calls for—are real, substantial rights, and as much the subject of governmental protection as any other right of person or property. But it is urged that it is the right of the citizen to regard the Sabbath as a day of recreation and amusement, rather than as a day of rest and religious worship, and that he has a right to act upon that belief and engage in innocent amusements and recreations. This position it is not necessary to gainsay. But who is to judge and decide what amusements and pastimes are innocent, as having no direct or indirect baneful influence upon the community, as not in any way disturbing the peace and quiet of the public, as not unnecessarily interfering with the equally sacred rights of conscience of others? May not the legislature, following the example of James I., which was cited to us as a precedent, declare what recreations are lawful, and what are not lawful, as tending to a breach of the peace or a corruption of the morals of the people? That is not innocent which may operate injuriously upon the morals of the old or young, which tends to interrupt the peaceable and quiet worship of the Sabbath, and which grievously offends the moral sense of the community and thus tends to a breach of the peace. It may well be that the legislature, in its wisdom, thought that a theatre was eminently calculated to attract all classes, and the young especially, on a day when they were released from the confinement incident to the duties of the other days of the week, away from the house of worship and other

places of proper rest, relaxation, and instruction, and bring them under influences not tending to elevate their morals and to subject them to temptation to other vices entirely inconsistent with the safety of society. The gathering of a crowd on a Sunday at a theatre, with its drinking saloons, and its usual, if not necessary facilities for and inducements to licentiousness and other kindred vices, the legislature might well say was not consistent with the peace, good order, and safety of the city. They might well be of the opinion that such a place would be "a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel." But whatever the reasons may have been, it was a matter within the legislative discretion and power, and their will must stand as the reason of the law.

We could not if we would review their discretion and sit in judgment upon the expediency of their acts. We cannot declare that innocent which they have adjudged baneful, and have prohibited as such. The act in substance declares a Sunday theatre to be a nuisance, and deals with it as such. The Constitution makes provision for this case by providing that the liberty of conscience secured by it "shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the State." The Legislature have declared that Sunday theatres are of this character, and come within the description of acts and practices which are not protected by the Constitution, and they are the sole judges. The act is clearly constitutional, as dealing with and having respect to the Sabbath as a civil and political institution, and not affecting to interfere with religious belief or worship, faith or practice.

It was conceded upon the argument that the Legislature could entirely suppress theatres and prohibit theatrical exhibitions. This, I think, yields the whole argument, for as the whole includes all its parts, and the greater includes the lesser, the power of total suppression includes the power of regulation and partial suppression. If they can determine what circumstances justify a total prohibition, they can determine under what circumstances the ex-

hibitions may be innocuous, and under what circumstances and at what times they may be baneful, so as to justify a prohibition.

The other points made and argued are of less general importance, as they only affect this particular case, and notwithstanding, they were ably and ingenuously urged, I have been unable to appreciate the views taken by the learned counsel for the plaintiff in error.

The law does not touch private property or impair its value. The possession and use of it, except for a single purpose and upon a given day, and the right to the possession and use, is as absolute to the plaintiff in error as it was the day before the passage of the law. The restraint upon the use of the property is incidental to the exercise of a power vested in the Legislature to legislate for the whole State. The ownership and enjoyment of property cannot be absolute in the sense that incidentally the right may not be controlled or affected by public legislation. Public safety requires that powder-magazines should not be kept in a populous neighborhood; public health requires that certain trades and manufactures should not be carried on in crowded localities; public interest requires that certain callings should be exercised by a limited number of persons and at a limited number of places; and legislative promotion of these objects necessarily qualifies the absolute ownership of property to the extent that it prohibits the use of it in the manner and for the purpose deemed inconsistent with the public good, but that deprives no man of his property or impairs its legal value. The fact that the plaintiff in error leased the property with a view to its occupancy for the purposes of a Sunday theatre does not vary the question. He might have bought it for the same purpose, but that would by no means lessen the power of the Legislature, or give him indefeasible right to use it for the purpose intended, or to establish or perpetuate a public nuisance. The power of the Legislature cannot thus be crippled or taken from them. As lessee, he is *pro hac vice* the owner. He took his lease as every man takes any estate, subject to the right of the Legislature to control the use of it so far as the public safety requires.

The contract with the performers, if one exists, for these services on the Sabbath, stands upon the same footing, and is also subject to another answer, to wit, that the contract for Sabbath work was void without the law of 1860. *Smith* vs. *Wilcox; Watts* vs. *Van Ness; Palmer* vs. *New York, supra.* The sovereign power must, in many cases, prescribe the manner of exercising individual rights over property. The general good requires it, and to this extent the natural rights of individuals are surrendered. Every public regulation in a city does in some sense limit and restrict the absolute right of the individual owner of property. But this is not a legal injury. If compensation were wanted, it is found in the protection which the owner derives from the government, and perhaps from some other restraint upon his neighbor in the use of his property. It is not a destruction or an appropriation of the property, and is not within any constitutional inhibition. *Vanderbilt* vs. *Adams*, 7 Cow., 349; *People* vs. *Walbridge*, 6 Id., 512; *Mayor, &c., of New York* vs. *Miln*, 11 Peters, 102; 3 Story's Const. Law, 163.

The conviction was right, and the judgment must be affirmed.

In the New York Superior Court—General Term.

Before all the Justices.

WILLIAM CHAUNCEY *vs.* LEMUEL ARNOLD, &C.

1. A sealed instrument creating an obligation, executed in blank, cannot be filled up by the person to whom it may be addressed in that condition so as to become operative against the party executing it, even if advances have been made upon the faith of it; and no parole authority to fill up such blanks could aid its validity, unless such authority had been exercised before delivery, and without the knowledge of the party to whom it was delivered.
2. An examination of the English and American cases relating to sealed instruments executed in blank, or altered after delivery.

In October, 1837, Caroline, wife of the defendant, Lemuel Arnold, and formerly a co-defendant in this suit, now deceased, being then unmarried, was entitled to an interest in a legacy,

under the will of her paternal grandfather, William W. Gilbert, by which ten thousand dollars was bequeathed to her and two of her sisters, after the death of their mother, the survivors taking the shares thereof of any who should die unmarried; also to the sum of eleven hundred dollars, and interest thereon, then invested for her benefit, and certain articles of household furniture in a house in the City of New York.

On the 3d of October, 1837, Miss Caroline Gilbert, being about to be married to the defendant, Lemuel Arnold, entered into a tripartite agreement between her intended husband of the first part, herself of the second part, and her mother and sister Charlotte of the third part, whereby, after reciting her ownership of the property before mentioned, and the possibility of her acquiring other property, she granted and assigned all her then present or future property to her mother and sister, as joint tenants; upon trust, among other things, after the marriage, to receive the rents, issues and profits of such property, and apply them to the sole and separate use of herself, on her separate receipt, notwithstanding her coverture, during the joint lives of herself and husband, without being subject to his debts, control, forfeiture, disposal or engagements; and upon the further trust, among other things, to assign, set over, manage, exchange and dispose of such property to such persons, and in such manner and form, as she, notwithstanding her coverture, by any deed or writing under her hand or seal should direct, limit or appoint. It was also provided in such instrument that in case Mr. Arnold survived his wife, and there were no children of his then living, the trustees were to hold the property assigned for his separate use forever.

In September, 1846, Miss Charlotte Gilbert having become Mrs. Charlotte Brayton, by marriage, by that name executed a power of attorney to Edward Sandford, Esq., now deceased, empowering him to unite with Mrs. Gilbert, her co-trustee, and any other of the parties to the marriage settlement of her sister, Mrs. Arnold, in "pledging, mortgaging, or hypothecating the funds of such trust or the property included in and secured by it, or the avails and proceeds thereof, for such sum and upon such terms and

conditions as should be agreed upon by her said co-trustee and other parties, or as they shall deem must advisable for the interests" of her sister.

On the second of December, 1846, the defendant Arnold signed and sealed an instrument in the form of a bond, in the penal sum of ten thousand dollars, in which the name of any obligee was entirely omitted, and a blank space left where it is usually inserted, with a condition thereunder underwritten, to the effect, that if Arnold should pay the sum of five thousand dollars as soon as the estate of William W. Gilbert, late of the city of New York, deceased, should be distributed among his heirs at law and next of kin, with interest payable semi-annually on the first days of June and November, then the bond was to be void; the name of the person to whom the payment was to be made was again omitted, and a blank space left in its place.

On the same day (December 2, 1846,) a bipartite instrument was signed, sealed and acknowledged before a Commissioner of Deeds, to have been executed by Arnold, his wife, her mother, and Mr. Sanford, as attorney for Mrs. Brayton. In it they are described as parties of the first part, but there is no party of the second part named therein, a space being left blank before such designation. It recited an indebtedness by Arnold to the party of the second part, by bond, such as is stated in the bond last mentioned, and witnessed that the parties thereto of the first part, for the better securing the payment of the money mentioned in the condition of such bond, and for a nominal consideration, had granted and sold all the interest which Mrs. Arnold had in the estate whereof William W. Gilbert died seized, or possessed, as his heir at law, or next of kin, or which either of the other parties of the first part had therein as her husband or trustees. A defeazance and power of sale was included in such instrument.

The complaint alleges that such bond was executed by Arnold, to raise money to carry on a suit then brought by him and his wife in the Court of Chancery, to set aside the will of William W. Gilbert, and recover and protect certain rights of Mrs. Arnold in his estate, and that such second instrument was executed to secure the

bond. It further alleges that Arnold applied to the plaintiff in June, 1847, to furnish, upon such bond and mortgage, the means to enable the defendants to prosecute such suit; and that it was then agreed that the plaintiff should indorse from time to time the notes of Arnold for $1,200 or thereabouts, to enable him to raise money for the purpose aforesaid, and establish him in business with one Hawley, and furnish them goods on credit, with which to carry on said business, from which Arnold was to withdraw one thousand dollars yearly to support himself, and enable him to carry on such suit; and that such bond and conveyance should be delivered, as collateral security for any indebtedness of Arnold under such agreement. It then proceeds to allege that the plaintiff indorsed the notes of Arnold from time to time under the agreement, and for the purpose aforesaid, and was obliged thereby to pay the sum of $1,150, for which the defendants are indebted to him; and that he furnished goods to Arnold & Hawley under such agreement, to such an amount that a balance of $6,183 94, and interest for several years, is claimed by the plaintiff; and finally alleges that such suit was compromised, and a large amount of property received by Mrs. Arnold in her own right. The demand for relief in the complaint is for judgment against the defendant for the amount so due to the plaintiff, and in default of its payment, for an account of the consideration received in settlement of such suit, and of all the property received by Mrs. Arnold from the estate of William W. Gilbert, or otherwise, and that the defendants may make delivery thereof, for so much as may be sufficient to satisfy such indebtedness.

Since the commencement of this suit Mrs. Arnold has died, and the defendant Arnold has been substituted as defendant in her place, as her executor.

There is no allegation in the complaint that Mrs. Arnold, or her trustees, executed the conveyance in question with intent that it should be delivered to the plaintiff, either upon the agreement made by him or any other, or that they verbally authorized any one to fill up the blanks, or that they assented to the subsequent agreement with the plaintiffs, or that the moneys raised by Arnold,

on the notes or in his business, were ever employed by him, or agreed by him to be employed in conducting the suit in question, or that Mrs. Arnold ever verbally authorized any one to fill up the blanks in the bond and collateral instrument.

There is not even an allegation that such instruments were ever delivered to any persons to be employed by them in raising money thereon, or that any authority was ever given to any person to deliver them as the act and deed of the parties executing it, or that they were delivered to the plaintiff by such authority.

On the trial of the cause, after reading the ante-nuptial agreement, power of attorney to Mr. Sandford, and the bond in blank, in evidence, the plaintiff's counsel offered in evidence the collateral conveyance, to which the defendant's counsel objected on various grounds, and the same was excluded by the Court, to which exclusion the plaintiff's counsel then excepted, and rested his case. Upon motion of the defendant's counsel complaint was dismissed, and this appeal has been taken to determine the validity of such exception.

By the Court:

ROBERTSON, J.—The foregoing statement of facts reduces the questions in this cause simply to one, whether an instrument under seal, importing to bind the parties executing it, or the property over which they have control, in favor of any one whose name is left blank, can be made available in favor of any one who advances money or property on the strength of it, so as to enable them to proceed against the person or property bound.

A sealed instrument has always been held to have different characteristics from one unsealed; the affixing of the seal, which is a strange and unusual ceremony, seems to have been considered as entitling it to be looked upon as a symbol of some special efficacy, and as notifying those who adopt it that it is so; otherwise it would be a most idle and puerile form. As it is supposed to convey such information, it is plainly symbolic, and has therefore been called *solemn*, as calling upon a party to deliberate whether he will incur all the consequences of affixing his seal, over and above a mere ordinary assent to the terms of an agreement by

signing. Indeed, I think there can be no doubt that a party would hesitate much longer to seal, if he knew all the effect of affixing a seal, than he would if he only signed an instrument: carrying out this principle, the law has always held that no one can bind another by seal, unless the authority is given him by seal, for equal deliberation would be required before giving the power of doing what can be effected by a seal; and for this reason it has been held in the earliest authorities that blanks in a sealed instrument can only be filled up by authority under seal. Co. Litt., 171; Shep. Tomp., 54; Perkins, 118; 4 Ven. Abr. Blanks, Com. Dig. Fait. A., p. 1. If any innovation is to be made upon this principle, it is difficult to say where it should stop. Must the instrument have the form of an obligation with unknown persons, and can the authority only extend to supplying names? or can the terms of the obligation be supplied entirely? or, in fine, does such authority extend to the whole instrument? In other words, can a party place his seal on a blank piece of paper, and permit any one to write over any instrument he pleases so as to bind him? If he can, mankind have not discovered or practised this mode of giving unlimited control over a party's person and estate. The denial of such right does not interfere with the doctrine of estoppel, which stands on a different footing, where imposition is sought to be practised, nor with the power of re-acknowledging an instrument as a party's act after it is signed and delivered, and alterations are made with his consent. The doctrine that a deed in blank is of no avail, has been sustained by numerous authorities in England, and none will be found apparently counter to it which are not on examination susceptible of explanations. In *Markham* vs. *Gavaston*, Moore, 547; S. C. Cro. Eliz. 626, a bond of indemnity to an obligor in a former bond, in which the recital of the Christian name of the former obligee was left blank, was held good, although such blank was filled up by a third party, because it was done with the assent of the obligor. Sir Matthew Hale, and the rest of the Court, held, in *Touche* vs. *Clay*, 2 Lev., 35, that an alteration in a bond, by consent of the parties, did not vitiate it. There are cases, both in this country

and in England, where in the same written instrument there are entirely disconnected obligations or statements, which are wholly independent of each other, and where the alteration or insertion of one after others have been executed will not affect it: such was the case of *Lewis et al* vs. *Bingham*, 4 Barn. & Ald., 672; in it a deed in five parts, one of which was signed and sealed by the mortgagee, and the effective part of which, so far as he was concerned, was merely to release mortgaged premises to the mortgagor, was held to be binding, as regarded him, although subsequent and independent grants and stipulations had been tampered with after his execution of the instrument, Justice Bayley considering such deed to take effect, as to each party, at the time of his execution. So, too, in the case of *Wooley* vs *Constant*, 4 J. R., 54, it was held that a bill of sale of a vessel, in which its registry had not been copied, could be corrected by adding such copy, by consent of the vendor, because the bill was valid, and the only object of inserting such registry was to preserve its national character. Both cases came within the observation of Justice Hohoyden—the first, that even cancelling a deed will not revest rights that once have passed under it; even the destruction of an executed transfer does not carry back the property conveyed to the grantors. *Nicholson* vs. *Halsey*, 1 J. Ch., 417; *Raynor* vs. *Wilson*, 6 Hill, 469. At the head of modern English cases, stands that of *Weeks* vs. *Maillerdet*, 14 East., 568, which was very close. In it a deed had been executed, referring to a schedule of articles annexed; the articles had been agreed upon, a common agent was authorized to draw up and annex the schedule according to the understanding of the parties, which he did. Yet Lord Ellenbrough held that the deed, when delivered, had no object to operate upon, and if there was no schedule annexed, it was inoperative for any purpose. Such principle remained unshaken until the case of *Hibblewhite* vs. *M'Morine*, in the Court of Exchequer, was decided, Judge Park delivering an elaborate opinion, in which most of the dissenting cases are revised. This case is found in three different books: 6 Mees. & W. 200; 7 Law Journ. Rep., N. S. Exch., 217; 4 Lond. Jur., 769. It appeared

by it that the act incorporating a railway required sale and transfer of its stock to be under seal for certain purposes, and that the transfer in dispute had been executed with the name of the transferee in blank. Justice Park said "that a deed with the name of the vendee in blank at the time it was sealed and delivered, was void. To allow it to be filled up by an agent appointed by parole, and then delivered in the absence of the principal as a deed, would be a violation of the principle that an attorney to execute and deliver a deed for another must be appointed by deed;" and after an examination of the authorities, he came to the conclusion that "no authority shows that an instrument incapable of operation when executed, and which is no deed, can become a deed by being completed and delivered by a stranger in the absence of the party executing, and unauthorized by an instrument under seal. Indeed, this is an attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law does not permit." In a subsequent case of *Squire et al.* vs. *Whitton*, in the House of Lords, on appeal from the decision of V. Ch. Shadwell, H. L. C. Cl. & Fen., 333, where a bill had been filed in the Court of Chancery, to enforce a bond where the name of the obligee had been left blank, but it had been executed with the understanding that it should be delivered to a particular person who should advance the money when the name should be filled up, Lord Chan. Cottenham held that "the instrument was void at law as a bond, and was equally invalid as an agreement, because a party could not have one with the whole world. He must have some one with whom to contract, and the document was perfectly inoperative." In this State, it was held at an early day in the history of its jurisprudence, that an assignment of a lease could not be made by writing one over the signature and seal of the lessor in blank, *Jackson* vs. *Titus*, 2 Johns. Rep., 430, where such assignment to be valid must be under seal, and its authority will not be found to be impaired by any later cases.

The decisions in the different States have varied. Massachusetts, Connecticut, Ohio, Delaware, Maryland, Georgia, Kentucky, North Carolina, Tennessee and Indiana, have adhered to

the early law and principle. Pennsylvania, Virginia, Alabama, and Louisiana, range themselves on the side of a relaxation of it. Thus, on the former side are the cases of *Buckingham* vs. *Bailey*, 3 Mass. Rep., 30; *Hayden* vs. *Westcott*, 11 Conn. Rep., 129; *Ayres* vs. *Harness*, 11 Ham. (Ohio,) 368; *Clendanniel et al.* vs. *Hastings et al.*, 5 Harring, (Del.,) 408; *Edelin* vs. *Sanders*, 8 Mars. Rep., 118; *Ingraham* vs. *Little*, 14 Geor. Rep. 173; *Williams* vs. *Crutchen*, 5 How. Mis. Rep., 171; *Gorham* vs. *Reeves et al.*, 3 Ind. Rep., 83. On the latter, those of *Willy* vs. *Moore*, 17 S. & R., 438; 17 Pen. S. R., (5 Har.) 130; *Bury* vs. *Homans*, 8 Gratt., 48, 54; *Cox* vs. *Thomas*, 9 Id., 312; and the Louisiana cases of *Collins* vs. *Welch*, 9 L. R., 230; *Chalaron* vs. *M'Farlane*, 19 L. R., 179; *Fritz* v. *Commissioners*, 13 La. Ann., 524; *Bell* vs. *Keefe*, 2 N. S., 517; *Breedlove* vs. *Johnson*, 3 N. S., 82; *State* vs. *Judge of First District*, 19 L. R., 179. The decisions in Louisiana may have been influenced by the civil law, which recognizes no distinction except between private and official acts before a notary or some other functionary. The Federal Courts have adopted the English view of the law, *United States* vs. *Nelson and Myers*, 2 Brock., 64.

Two or three cases in England, which apparently deviate from the general doctrine held in *Hibblewhite* vs. *McMorine*, and *Squire* vs. *Whitton*, and some in this State, which depart from that of *Jackson* vs. *Titus*, require notice. The first in England is that of *Paget* vs. *Paget*, 2 Rep. in Chancery, 410, 3 Jac. 2, which holds that a deed of revocation and new settlement need not be read again to the party or resealed or executed to make it a good deed, where blanks were filled up in it after it was delivered. The report is silent as to the nature of the blanks, and what else was done after filling them up. It may have come within the decision in *Markham* vs. *Gavaston* and *Touche* vs. *Clay*, before cited, when done in the presence and by authority of the parties, so as to substantially make it a re-delivery, otherwise it is contrary to and overruled by all the cases before alluded to. In *England* vs. *Roper*, 1 Stark, 304, a witness, on proving the signing and sealing of the instrument, testified that he did not know if all the

blanks were filled up. Lord Ellenbrough held that an attesting witness was not bound to know it; that if a sealed instrument could be set aside, because he did not recollect it, few could stand the test; and he added that, "if the defendant was foolish enough to sign in blank he must take the consequences,"—that is, if he was unable to prove that it was in blank. The same judge pronounced the decision in *Weeks* vs. *Maillardet*, (ubi. sup.,) and could hardly have intended to hold so opposite a doctrine to it, as that a deed executed in blank was good. In the case of *Hudson* vs. *Revelt*, 5 Bing.; 368, the alteration was made in the presence of the parties and by their consent, and ratified, as was noticed by Justice Park in *Hibblewhite* vs. *McMorine;* and lastly comes the case of *Texira* vs. *Evans*, which upon insufficient grounds was held to have subverted the ancient rule in England and in this State. This case is cited by Wilson, J., in the case of *Master* vs. *Miller*, 4 Term, 320, S. C., 1 Anstr., 229, and reported only in a note thereto. Such report states that the defendant executed a bond, with blanks for the name and sum, and sent an agent to raise money upon it; the plaintiff lent a sum of money upon it, and the agent filled up the blanks, with the lender's name and the amount of the loan, and delivered the bond to him. Whether the principal authorized such filling up before delivery, or whether the lender was ignorant of the bond having been executed in blank, does not appear; in either case he might have been estopped from setting up what might be a fraud. The report is meagre; it is a mere *Nisi Prius* case, the decision never appears to have been appealed from or considered worthy of a distinct report, and it was only referred to upon the question of a power to alter an instrument. Preston questions the authority of *Texira* vs. *Evans*, in a note to Sheppard's Touchstone, 54, because, as he says, it assumes that there could be an attorney without deed. It was fully considered in *Hibblewhite* vs. *McMorine*, by Park, J., who declares that there are various authorities to the contrary. It was certainly disregarded by Lord Cottenham, in *Squire* vs. *Whittier*, and was declared by Justice Cresswell, in *Davidson* vs. *Cooper*, 13 Mees. & W., 345, to have been overruled in *Hibblewhite* vs.

McMorine, and was also so held in the late case of *Emthorn* vs. *Hoyle*, 13 C. B., 373. It will be found, however, though crushed in England, it has taken some slight root in this State.

A class of cases in this State seem to have established that a grantor may direct a third party to alter a deed before delivery; *Knapp* vs. *Maltby*, 13 Wend., 587, and that an erasure may be made after the first delivery, by consent of parties; *Penny* vs. *Corthwite*, 18 J. R. 499, and, if an executory obligation, a material alteration may be ratified by parties; *Waring* vs. *Smyth*, 2 Barb. Chan., 109. And this may be on the principle of estoppel, which is held to render even a deed nugatory; *Schult* vs. *Large*, 6 Barb., 373. There is only one case to be found in our reports which, apparently, impugns the doctrine of *Hibblewhite* vs. *McMorine*, which is that of *ex-parte* Kirwin, in 8th Cowen, p. 118. In that case, a motion was made in the Supreme Court for a mandamus, to compel the Common Pleas Court of a County to quash an appeal from the decision of a Justice's Court, because the recital in the appeal-bond of the judgment appealed from had not been filled up until after its execution, but before its delivery by the surety, by authority of the principal to fill it up, and deliver the bond as the act of both. This was, at most, the same state of things as in *Knapp* vs. *Maltby*, and might be sustained upon the ground of estoppel, but the application was denied upon the strength of *Texira* vs. *Evans*, which the court say was sanctioned in *Constant* vs. *Woolley*, (*ubi. sup.*) In the last case, Thompson, J., who cites *Texira* vs. *Evans* as authority, admits that the addition could not have been made to the bill of sale if it affected the rights of third parties by relation—that the bill of sale was good without it, with which principle *Texira* vs. *Evans* had nothing to do. The decision in *ex-parte* Kirwin could always be upheld, because no mandamus lay in such case at all, and the parties executing might be estopped; it was an *ex-parte* hearing. A case was cited as authority, since universally held not to be law, although cited, not necessarily for the decision of the case in which it was supposed to have been sanctioned, and contrary to principle and the whole current authorities. The case of *Mackay*

vs. *Bloodgood*, 9 J. R., 285, is only to the effect that two partners can adopt one seal for both. The reasoning in *Handford* vs. *McNair*, 9 Wend., 54, and *Bloodgood* vs. *Goodrich*, 9 Wend., 68, S. C. on ap., 12 Wend., 525, is adverse to the power of an agent to bind a party by seal unless he have authority by seal, even though the principal subsequently recognizes the contract when executed by the attorney. In the case of *Korbright* vs. *The Commercial Bank of Buffalo*, 20 Wend., 93, S. C. on app., 22 Wend., 348, it was held that stock might be transferred by the holder writing his name and putting his seal on the certificate of stock, there being a usage to that effect, and no law forbidding a transfer in that way, and the seal becoming thereby unnecessary, as in the case of a transfer of any other chose in action.

Upon the whole, therefore, I do not find that there is any law of this State by which a sealed instrument, creating an obligation executed in blank, can be filled up by the person to whom it may be delivered in that condition, so as to become operative against the party executing it as a sealed instrument, whatever may have been the intent of the party executing it, and whatever advances may have been made upon the faith of it, and that no parole authority to fill it up could increase its validity unless such authority was exercised before its delivery, and without knowledge of the party to whom it was delivered.

There being no pretence of any independent agreement or authority to borrow money by Mrs. Arnold, or any imperfect execution of her power of appointment for that purpose to be repaired, the instrument in question was not available in evidence for any purpose, and was therefore properly rejected.

The case presents several other points, upon which the present appeal might turn, but the counsel thought proper to confine the argument to this single point.

The judgment must therefore be affirmed, with costs.

In the Supreme Court of Pennsylvania.

THE GIRARD BANK *vs.* THE BANK OF PENN TOWNSHIP.[1]

1. The holder of a bank check marked 'good,' stands on the footing of an ordinary depositor, and no right of action exists, and the statute of limitations does not begin to run until a demand has been made by the holder upon the bank for payment.
2. A check was drawn on the 7th of October, 1852, and probably certified when it was drawn. It was not presented for payment until September 3, 1859, nearly seven years from the date of the deposit. On the 10th of October, 1854, the bank paid the money to the original depositor, taking his bond of indemnity against the certified check.
3. HELD: that the plaintiff was not barred of his action against the bank by such delay in making the demand for payment, and that the taking of the bond of indemnity was a distinct acknowledgment that the money then remained on deposit to the credit of the holder of the certified check.

Error to the District Court of Philadelphia County.

The opinion of the Court was delivered by

STRONG, J.—Were this a suit against the Bank of Penn Township by the original depositor, the statute of limitations would be interposed in vain, not so much because a bank is a technical trustee for its depositors, as for the reason that the liability assumed by receiving a deposit is to pay when actual demand shall be made.

The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused, such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows, that no right of action exists, and the statute of limitations does not begin to run until the demand

[1] We are indebted to the Legal Intelligencer for the report of this case.—*Eds. Am. L. Reg.*

stipulated for in the contract, has been duly made. For this, authorities are hardly necessary. Two were cited in the court below, and they suffice; *The Union Bank* vs. *The Planters' Bank*, 9 Gill. & Johnson, 439-461, and *Johnson*, vs. *The Farmers' Bank*, 1 Harrington, 117-119.

Nor is it easy to see why the holder of a check marked "good," stands in any different position from that of the original depositor. Presenting a check and having it thus certified, is clearly not a demand for the money deposited. Its purpose is not to demand payment, but to obtain evidence that the sum mentioned in the check remains on deposit to answer the check when presented. It contemplates that the bank is still to retain the custody of the money. How retain it? As a depository, or as value paid for the acceptance of a bill of exchange? Certainly not as the latter, for then no demand at the banking house would be necessary before suit, and the presentment of a bill payable on demand, merely for acceptance, is an absurdity. When a check payable to bearer, or order, is presented with a view to its being marked "good," and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the check, and is specifically appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. Certainly he has no right of action until payment has been actually demanded and refused. That he stands on the footing of an ordinary depositor is the doctrine of *Willetts* vs. *The Phœnix Bank*, 2 Duer., 121. In that case it was said by Chief Justice Oakly, "it is the duty of the officer certifying a check, to cause it to be immediately charged as paid in the account of the drawer, and when this is done the sum thus charged will remain as a deposit in the bank to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands exactly upon the same ground as any other. The bank, instead of being prejudiced, is benefited by the delay of the owner in calling for its payment, and can with no more pro-

priety impute laches to the unknown holder of the check than to a known holder of an ordinary deposit." Marking a check "good," was held to be an unconditional engagement to hold a sufficient amount of the funds of the drawer to meet the check whenever it should be presented for payment. *The Farmers' and Mechanics' Bank* vs. *The Butchers' and Drovers' Bank*, 4 Duer., 219, is to the same effect. The doctrine is sound. Checks on a bank marked "good," are to be regarded as evidences of deposit to the credit of the holder, and laches in making a demand for payment is no more imputable to him than to any other depositor.

These principles were conceded by the learned judge of the District Court, but he was of opinion that inasmuch as there was no evidence, in this case, of any demand made by the holder of the check within six years from the date of the contract, the plaintiffs could not recover. The check was drawn on the 7th of October, 1852. When it was certified does not appear, but it probably was when it was drawn. It was not presented for payment until Sept. 3, 1859. Nearly seven years, therefore, elapsed from the date of the deposit before demand was made for its return, and the question now is whether such delay in making the demand bars the plaintiff from a recovery. If it does, then this artificial rule, which is said to have been adopted in analogy to the statute of limitations, is far more severe upon depositors than is the statute itself.

The statute begins to run, not from the date of the deposit, but from the time when the depositor makes demand for payment, and is met with a refusal. This rule completes the bar in six years from the date of the deposit, and as it was applied in the present case, it amounts to a presumption incapable of being rebutted. On the 10th of October, 1854, within six years from the commencement of this suit, the defendants paid the money to Adam Dietrich, the original depositor, taking his bond of indemnity against the certified check which he claimed to have lost, though in truth he had endorsed it away. This paying a duplicate check, and taking a bond of indemnity, was a distinct acknowledgment that the money then remained in bank on deposit to the credit of the holder of the check which had been certified. It was certainly sufficient to rebut

any presumption less than a conclusive one, that it had been paid. Now, as no statute requires that, in cases where a creditor must make a demand before he can sue, the demand shall be made within six years from the date of the contract, or action be debarred; any rule exacting demand within that time can have no other basis upon which to rest than a presumption that the debt has been paid, or the deposit withdrawn. What becomes of such a presumption in the face of a clear acknowledgment of the debtor that the debt remains unpaid, or that the deposit is a continuing one?

We cannot agree that there is any such rule applicable to an ordinary case of debtor and creditor, banker or depositor, or bailor and bailee. It would be mischievous in its operation upon contracts generally, and mischievous in the extreme when applied to contracts of bailment. And we think it would be a surprise, were we to hold that banks or other corporations can defend themselves against claims for deposits or undrawn dividends, on the ground that no actual demand has been made for them within six years.

In *Thorpe and Wife* vs. *Booth*, 1 Ryan & Moody, 388, 21 Eng. C. L. Rep. 468, it appeared that suit had been brought upon a promissory note dated March 12, 1813, whereby the defendant promised to pay seven hundred pounds "twenty-four months after demand." The note was not presented for payment until June 28, 1823; more than ten years after it was given. The defendant pleaded the general issue and the statute of limitations. But the plaintiff was held entitled to recover on the ground that the cause of action did not arise until twenty-four months after the demand was actually made. That it was not made within six years from the date of the note was treated as of no consequence. This was a case between a simple debtor and creditor. There is even less reason for requiring a depositor to make speedy demand, for it would defeat the very purpose of the deposit.

It is true there are cases, and we have been referred to some of them during the argument, in which it was held to be incumbent upon a plaintiff to make a demand, where actual demand was necessary, within a reasonable time from the making of the contract, and generally within the time limited by the statute of limitations

for bringing the action. The circumstances of all these cases are, however, peculiar, and none of them were between an ordinary creditor and debtor, or depositor and depository, or bailor and bailee, for custody. The first of them is *Carman* vs. *Rogers*, 10 Pick. 112. It was a bill in equity brought to compel the settlement of a partnership account twenty-five years after the firm had been dissolved, and nineteen years after a partial account had been settled. From 1809 to 1826, no demand was made for a further settlement. The bill was dismissed on account of the laches of the complainant. The observations made by Wilde, J., in delivering the opinion of the court, were unnecessary to the case, mere *obiter dicta*, though worthy of consideration. In remarking upon the time within which demand should be made, where demand is necessary previous to the commencement of an action, he said, a demand must be made within a reasonable time, otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend upon circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. He then proceeded to show that the complainant had been guilty of great laches in lying by for seven years, without making any claim, until after the death of the person whose estate he sought to charge, and until after the papers of the decedent had been destroyed by fire, and decreed that the plaintiff was not entitled to relief *in a court of equity*. Surely there is nothing in this case to support the doctrine that a depositor must make a demand for his deposit within six years, or be debarred from recovering it by action. Yet this case is the leader of all the others which have been cited. In the *Pittsburg & Connellsville Railroad Co.* vs. *Byers*, 8 Casey, 22; *Same* vs. *McCully*, 8 Casey, 25, and *Same* vs. *Graham*, 12 Casey, 77, it was held, that the Railroad Company having permitted more than six years to pass from the time of subscription to its capital stock, without making calls upon the subscribers, was debarred from maintaining an action. The contract of subscription was a peculiar contract; the Legislature

had fixed five years as the limit within which the construction of the road should be commenced. It was the duty of the company to commence it and to prosecute it vigorously, and, of course, to make the calls without delay. Nothing like a continuing relation of promissor and promissee was contemplated. The parties stood in a very different position towards each other from that which a depositor holds towards his banker, and as the company had taken no steps within the six years to prosecute their road, there was warrant for a presumption that their rights against subscribers to the capital stock had been abandoned. The only other case is *Morrison's Adm'r* vs. *Mullin*, 10 Casey, 12. There a receipt had been given to the sheriff by a judgment creditor, for part of the proceeds of a sheriff's sale, with a stipulation, that if on a settlement of the liens on the debtor's interest in the lands sold, the creditor was not entitled to the money received, he would refund it, or so much as he was not entitled to retain. Twenty-two years afterwards the sheriff brought suit on the stipulation contained in the receipt, and the statute of limitations was pleaded. This court held that the action could not be maintained in consequence of the sheriff's delay in procuring a settlement of the liens. In fact, the twenty years presumption stood in the way of recovery.

In delivering the opinion of the court, Mr. Justice Thompson referred to the rulings in *Carman* vs. *Rogers*, and *Railroad Co.* vs. *Byers*, but without laying down, or intending to assert a general doctrine that where demand is necessary under a simple contract before bringing an action, it must in all cases be made within six years from the date of the contract.

Indeed all the cases, from *Carman* vs. *Rogers* down, when speaking of the reasonable time within which demand ought to be made, and defining it as generally the statutory period for limitations, add, "when no cause of delay is shown." Even this qualification is an important one as applied to the present case. An early demand would have defeated the object of the deposit, and the certified check was mislaid for years.

Upon the whole, we find nothing in the adjudicated cases which requires us to hold that a depositor is debarred of his action against

his banker by delaying to call for his deposit more than six years from the time when he placed the money in bank. And we think such a doctrine would be alike impolitic and unjust.

The judgment for the defendants, *non obstante veredicto*, must therefore be reversed, and judgment entered on the verdict for the plaintiffs.

Judgment reversed, and judgment on the verdict for the plaintiffs.

In the Supreme Court of Pennsylvania.

WM. H. DENNY AND THE EXCHANGE BANK OF PITTSBURGH *vs.* ELECTA LYON.[1]

1. A general power of attorney to transfer bank stock, as collateral security for a debt, executed with a blank for the name of the transferee, is made specific by the attorney inserting a particular name—and he cannot afterwards erase that name and insert another, and transfer the stock to the name last inserted.

2. The practice of executing powers of attorney and other instruments under seal, with blanks to be filled up afterwards, commented on and disapproved, and their general validity doubted.

3. Where collateral security had been pledged by a mother for the debt of her son, which debt was a note drawn by the son and endorsed by another, who was part owner of a steamboat with the son, and in a suit between the creditor and the mother in regard to the collateral, the creditor released the endorser to make him a witness, *held*, that the release of the endorser released the collateral security for the debt.

Appeal from the decree of the District Court of Allegheny County. In Equity.

Shaler and *H. B. Wilkins* for appellants.

Hamilton and *Acheson*, contra.

The opinion of the Court was delivered at Harrisburg, May 6, 1861, by

WOODWARD, J.—This bill was filed to compel Dr. Denny and the Exchange Bank to re-transfer to the plaintiff twenty-eight shares of the capital stock of the said bank, which the plaintiff alleges she loaned to her son, Martin S. Lyon, for the purpose of pledging them, under a power of attorney, executed by her in blank, as col-

[1] We are indebted to the Pittsburg Legal Journal for this case.—*Eds. Am. Law Reg.*

lateral security for a debt which he owed to Preston & Wagner. That debt having been paid, Mrs. Lyon reclaims her stock.

The respondents deny that the stock was loaned to Martin to be pledged for the debt of Preston & Wagner, or any specific debt, and allege that it was loaned to him for the purpose of raising money, generally, to assist him in carrying on his business; and that after his debt to Preston & Wagner had been paid, he obtained a new loan on the credit of this stock from Nancy Harding, through Dr. Denny, and that Annie R. Aspinwall having purchased the loan and all its securities of Mrs. Harding, the stock is now held in trust for her until the debt is paid.

There is no doubt that Martin S. Lyon made this second pledge of the stock for the purposes alleged in the answer, but there is no evidence that he did it with the knowledge or consent of his mother. The question, therefore, becomes very material, whether she, in the first instance, placed this stock in his hands to be hypothecated to Preston & Wagner specifically, or to be used generally for obtaining money in the market as his necessities might require. Her son, Thomas Lyon, who was the subscribing witness to the power of attorney, swears that "the certificate of stock and power of attorney were delivered to M. S. Lyon for the purpose of using said stock as collateral security for the payment of a certain note held by Preston & Wagner against the owners of the steamboat W. H. Denny, and for no other purpose." The witness explains that of that boat his brother Martin was part owner—that Preston & Wagner, who had furnished the engine, required security for their debt—that the debt was put into the form of a note drawn by Martin S. Lyon, and endorsed by Wm. Noble—and that the mother's stock was to be transferred as collateral security for the note. To the same effect is the testimony of Martin himself. And what corroborates these witnesses with considerable force is the fact that Dr. Denny filled up the blank in the power of attorney with the names of Preston & Wagner. It may be, as is alleged, that he did not know when the power of attorney was first delivered to him—that the purpose of it was to secure Preston & Wagner, but he must have understood this purpose before the transaction was

consummated, else why did he insert their names? As executed by Mrs. Lyon, the power authorized Dr. Denny, as her attorney in fact, to transfer her stock to anybody, but as filled up by him, it was a special power authorizing him to transfer it to Preston & Wagner.

Such proof goes very far to sustain the allegation of the bill, that the complainant parted with her stock only for the purpose of securing Preston & Wagner, and that Denny understood this purpose.

And yet, we have to look at the palpable fact that a mother gave her son in business a letter of attorney, directed to Dr. Denny, authorizing him to transfer her stock to any name that might be inserted—that the son first pledged it to Preston & Wagner, and then caused the attorney in fact to borrow more money on it, and to pledge it to himself as agent of the lady creditors above named. What if the original purpose was to secure Preston & Wagner, was not this giving a son an opportunity to obtain money on false pretences? How could she know the power of attorney would be used only for the benefit of Preston and Wagner, or for them at all? If she meant it only for them, why did she not say so? May a lady put her stock, with a blank power of attorney, into market, and when she finds it transferred *bona fide* to secure a creditor who advanced money on the faith of it, come into equity and have the transfer cancelled on the ground that that was not the creditor whom she meant her stock should protect?

That must be regarded as very poor ground for equitable relief. In most cases it would be unfit to bottom a decree upon.

But this case is distinguished by one important circumstance. Mr. Murray, the cashier of the bank, swears that the "name of the transferee is usually not inserted in the power of attorney, and that it is more convenient not to have it inserted." We know that this is the commercial usage. It was probably originated by the banks. If not, they have countenanced it, and thus brought people to practice it. And yet it is a vicious usage, which no considerations of convenience are sufficient to justify. *Malus usus abolendus est.*

A power of attorney signed, generally sealed and duly delivered,

what is it but a finished legal instrument? Who may alter that paper writing to the prejudice of another, without incurring liability to the charge of forgery? If commercial usage permit the attorney to insert the names of Preston & Wagner, and then erase them, then insert the name of Wm. Noble, and next erase it, and then insert his own name as agent, what other legal instrument may not commercial usage tamper with in like manner? How striking an illustration of the badness of this usage we have in this case is seen, when we consider that Mrs. Lyon's title to her bank stock is made to depend on what may happen to have been inserted without her knowledge or consent in a legal instrument, wherein she was instructed to leave a blank.

Issuing her power in blank, implies, say the defendants, her intention to pledge her stock to any creditor who should loan money to her son. Filling up the blank with the names of Preston & Wagner implies, she argues, that the defendants knew she had issued it only for the benefit of that particular firm. Erasing their names and inserting his own as agent of other creditors, says Dr. Denny, makes the transfer under it legal and valid. No, she rejoins, you exhausted your power when you inserted Preston & Wagner. And out of this forensic game of shuttle-cock and battle-door, we are expected to educe the equities of parties that shall determine the title to the stock.

Well, if it must be done, we will say, without intending a precedent, that Mrs. Lyon having proved her allegation that she transferred the stock only to secure Preston & Wagner, is entitled to a return of it, seeing that their debt has been fully paid. If it be said, that issuing the power in blank was an authority to insert any name, it is a sufficient answer that the name actually inserted was in accordance with the truth, and exhausted the authority.

We feel the more satisfaction with this conclusion, because we apprehend the release of Noble in order to make him a witness, discharged the suretyship of Mrs. Lyon. If the defendants held her stock as collateral security for the note of Martin S. Lyon, endorsed by Noble, and may enforce a transfer of the stock in payment of the debt, it is too plain for debate that she would be entitled to the

note and the security of Noble as endorser. Yet the defendants have released him without her consent. A creditor who receives a collateral security from a third party is bound, if he avails himself of the collateral, to preserve the original debt, for in equity the surety will be entitled to subrogation to it, and to release an indorser is so to impair the debt as to discharge the surety.

The decree below is affirmed.

In the New York Court of Appeals—June Term, 1861.

MARY P. DURANDO, APPELLANT, *vs.* CHARLES C. P. DURANDO ET AL., RESPONDENTS.

1. It is an inflexible rule that before the widow can be entitled to dower, the husband must have been seized, either in fact or law of an estate of inheritance in the land during coverture.
2. Hence, a simple reversion in fee or a vested remainder expectant on an estate for life, held or enjoyed by the husband, cannot create an estate of which the widow is dowable.
3. The meaning of the word "purchase," and the senses in which it is used in the law of realty.

The opinion of the Court was delivered by

SELDEN, J.—To entitle a widow to dower, a husband must have been seized, either in fact or in law, of an estate of inheritance in the land at some time during the coverture. This rule is inflexible. When, therefore, the husband had, previous to his death, simply a reversion in fee or a vested remainder, expectant upon an estate for life, his widow cannot be endowed, as in such a case the husband has never had either possession or any present right of possession; he cannot be said to have had a seizure of any sort, either actual or legal. It is conceded by the counsel for the appellant, that this rule applies where lands descend to the husband, subject to the right of dower of the widow of the ancestor; as if a father die intestate, leaving a widow and a son, and the widow is endowed, it is not claimed that the widow of the son, in case of his death in the lifetime of his father's widow, could ever be endowed of the lands which had been assigned for the dower of the latter. But it is

insisted that where the estate comes to the husband, not by inheritance, but by purchase, the widow may be endowed, notwithstanding her husband has only a remainder in the land.

This distinction, or rather the idea that it applies to this case, is evidently founded upon a misapprehension. It is true that where a father conveys lands to a son, subject to the contingent right of the wife of the father to dower, if the father dies and his widow is endowed, and before her death the son dies leaving a widow, the latter, if she survives the widow of the father, is entitled to dower in the lands of which such widow had previously been endowed. But the reason is not because there is any distinction between a vested remainder which comes by descent, and one created by deed, but because, in the case supposed, the son becomes actually seized of the estate in the lifetime of the father; and this seizin is sufficient to entitle his widow to dower, although his estate is contingent, and is defeated by the death of a father leaving a widow. I can discover no other foundation for the position assumed by the appellant's counsel, than the inapt use by Coke of a single word in a passage which I will quote. In speaking on this subject he says: "For example, if there be grandfather, father and son, and the grandfather is seized of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father who dieth either before or after entry; now is the wife of the father dowable? The father dieth and the wife of the grandfather is endowed of one acre and dieth; the wife of the father shall be endowed only of the two acres residue, for the dower of the grandfather is paramount; the title of the wife of the father and the seizin of the father, which descended to him (be it in law or actual,) is defeated; and now upon the matter, the father had but a reversion expectant upon a freehold, and, in that case, *dos de dote peti non debet*, although the wife of the grandfather dieth, living the father's wife. And here note a diversity between a descent and a purchase. For, in this case aforesaid, if the grandfather had *enfoeffed* the father, or made an intail unto him, then in the case aforesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother; and the reason

of this diversity is, for that the seizin that descended after the decease of the grandfather to the father is avoided by the endowment of the grandmother; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummated) is not defeated, but only *quoad* the grandmother, and in that case these shall be *dos de dote.*" Coke Litt., 31, a. b.

The word purchase, which occurs in this paragraph, when used in contradistinction to descent, includes the obtaining of title by devise as well as by deed. But the whole reasoning of the passage quoted shows, that the effect attributed to a purchase follows only when the land is conveyed by a deed. The sole reason given for that distinction is, that purchase takes effect in the lifetime of the vendor, and the purchasor becomes at once seized of a defeasible estate; while in case of a descent, the heir is never seized of the lands assigned for dower, during the life of the widow, as her title relates back in all cases to the death of her husband. Now, in this respect, there is not the slightest difference between a descent subject to dower, and a devise subject either to dower or any other life estate. In either case the freehold passes directly to the tenant of the life estate upon the death of the ancestor or devisor, and neither the heirs nor the devisee of the remainder can have any seizin until the death of such tenant.

The distinction is stated in terms perfectly accurate and precise by the Chancellor, in the case of *Durham* vs. *Osborn*, 1 Paige, 634; but in the subsequent case of *Cregier* vs. *Osborn*, 1 Barb. Ch. R., 598, he uses the word purchase as it is used by Lord Coke, and states the distinction as being between estates which come to the husband, and those which come by purchase subject to dower. This inaccuracy in the use of the word purchase, by both Lord Coke and Chancellor Walworth, is perfectly palpable; but as it has led to the bringing up of so clear a case as the present to this court, it may be well to advert to and explain it. That it is this which has misled the counsel for the appellant, is obvious, as he commences his citations in support of his doctrine with the Year-Book, 5 Edw. 3, title Voucher 249, which appears to be the very authority upon